NO. 89-524

In the Supreme Court of the United States

OCTOBER TERM, 1989

SAMMILINE COMPANY, LTD.
and
HIGHTWORTH SHIPPING, LTD.
Petitioners,

v.

JOHN WOODS, BEVERLY WOODS,
COOPER/T. SMITH STEVEDORES,
and
PIONEER NAVIGATION, LTD.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS JOHN AND BEVERLY WOODS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents, John and Beverly Woods, respectfully pray that the Court deny the writ of certiorari sought by petitioners in the above-entitled proceeding.

STATEMENT OF THE CASE

Plaintiff-respondent, John Woods, was injured on July 19, 1984, while working as a longshoreman for Cooper/T. Smith Stevedoring in the number 2 hold of the petitioners' vessel, the M/V SAMMI HERALD. Prior to that date, the M/V SAMMI HERALD had been loaded in Brazil with a cargo of steel pipe. Some of this cargo was destined for New Orleans; some of it was destined for Houston. As stowed in Brazil, the Houston-bound pipe overlapped the New Orleans-destined pipe. As a result, an intended alleyway between the cargo did not at all exist. The vessel left Brazil, and the vessel-interests made the decision en route to call first at New Orleans instead of Houston, which was to have been the first port of call. While the New Orleans longshoremen were attempting to remove the New Orleans pipe, the forward end of a piece of pipe came into contact with the overlapping Houston pipe; this caused the aft end of the New Orleans pipe to whip around in the direction of the longshoremen. As Mr. Woods and his fellow longshoremen attempted to evade the swinging pipe, Mr. Woods stepped into a gap in the cargo. As he fell, the errant pipe struck him. As a result, Mr. Woods suffered serious injuries.

In Brazil, both preliminary and final stowage plans were presented to the vessel's master for his approval. The captain testified at trial that he knew that cargo, which was destined for two different ports, overlapped. He also testified that it was customary for the vessel's chief mate to inspect the cargo after it was loaded. Although the cargo of steel pipe overlapped, the captain of the M/V SAMMI HERALD acknowledged that it was his practice to leave for the next port of call even though he believed the cargo would be unsafe for a discharging stevedore.

The vessel-owner exercised authority over where the cargo was to be stowed. The vessel's captain testified that it was his crew's responsibility to supervise the loading of cargo on the vessel. In keeping with this duty, the preliminary stowage plan prepared for the cargo of steel pipe was subject to the master's approval. The ship's master had the authority to change the stowage plan. Evidence revealed that it was customary for the cargo to be loaded and carried subject to the master's approval and that the stowage of cargo was the master's responsibility. In fact, no cargo was loaded aboard vessels in Brazil over the objection of the captain. The master and the chief mate of the M/V SAMMI HERALD approved the preliminary stowage plan for the cargo of steel pipe to be loaded into the vessel's number 2 hold. That the officers of the M/V SAMMI HERALD approved the condition of the stowage of the steel in the number 2 hold before the ship left Brazil is uncontradicted.

With respect to the cargo of steel pipe, the M/V SAMMI HERALD's chief mate testified that the stowage was not in the best condition. He acknowledged that he was aware of the stowage plan for the cargo, went into the vessel's hold to inspect the stowage, and checked on the lashing of and position of the cargo. He reviewed the stowage plan before loading of the steel commenced. He had authority to recommend loading procedures to the cargo interests which oversaw the stowage of steel loaded onto the vessel. And, he acknowledged that the stevedores had no discretion to correct the loading of the cargo onto the ship.

The chief mate, who had approved the stowage of the steel before the M/V SAMMI HERALD left Brazil for

New Orleans, admitted that the stowed cargo was in the same condition when the vessel arrived in New Orleans. As was customary, he looked into hold number 2 before the New Orleans longshoremen undertook to discharge the cargo. Although the final stowage plan for hold number 2 indicated that an alleyway should have existed between the Houston-bound and the New Orleans-bound pipe, no such alleyway existed after the pipe was loaded in Brazil, and no such alleyway existed when the cargo arrived in New Orleans. Although the vessel's chief mate had the duty to approve the overall stowage of the cargo and although he also had responsibility for reviewing and accepting the stowage plan, he testified that he did not pay any particular attention to whether there were proper separations between the cargoes.

A cargo superintendent for Cooper/T. Smith also testified that the Houston-bound pipe overlapped that destined for New Orleans and that no alleyway between the two cargoes existed when the vessel arrived in New Orleans. He testified that the Cooper/T. Smith stevedoring crew did not create the overlapping. The superintendent brought the overlapped condition of the pipe to the vessel's officers' attention, informing the chief mate in particular that the discharge operation would be slow because of the overlapped cargo.

A marine surveyor testified that it appeared to him that the ship was loaded with the intent that Houston cargo would be offloaded first. He further stated that the Houston cargo could have first been unloaded in New Orleans, and he informed the chief mate of the vessel about the poor stowage. The surveyor testified that the overlapped cargo increased the hazard to longshoremen, such as respondent, and that if the vessel had first offloaded the Houston cargo, this hazard would have been lessened. But,

only the ship's officers or its charterer had the authority to order that the Houston pipe be offloaded first.

No question exists but that the vessel's officers were aware at the time that the M/V SAMMI HERALD left Brazil that the Houston-bound pipe overlapped the pipe destined for New Orleans. Thus, well before the Cooper/T. Smith longshoremen, including Mr. Woods, arrived at the dock to commence discharge of steel pipe from the aft portion of the M/V SAMMI HERALD's number 2 hold, the vessel's chief officer and other representatives of the petitioners were perfectly aware that the vessel's number 2 hold had not been stowed in accordance with a stowage plan that was both devised and approved by the petitioners themselves. Pipe destined for Houston overlapped pipe to be offloaded in New Orleans. No clear alleyway existed between these cargoes.

The vessel and cargo interests made the decision to call first at the port of New Orleans, and, once there, they failed to direct the longshoremen first to remove the overlapped Houston pipe. The longshoremen realized that they were forced to confront an unusual situation. The crane operator for Cooper/T. Smith testified that when the ship's crew opened the hatch, he saw "a bad situation." When asked whether he saw an alleyway between the pipe, he testified bluntly "No way." He also testified that it was impossible to remove the New Orleans pipe without its coming into contact with the Houston-bound pipe. Yet, no one gave the longshoremen permission to discharge the Houston pipe first, a decision that was not theirs to make. If there had been an alleyway between the two cargoes, the crane operator believed that no problem would have existed, for the New Orleans pipe would not have inevitably caught on the Houston pipe.

A marine surveyor hired by Cooper/T. Smith Stevedores testified that overlapping of steel cargo, like that in the number 2 hold of the M/V SAMMI HERALD, increased the hazard to longshoremen. Another expert marine surveyor testified similarly, finding that the stowage of the pipe in the number 2 hold was "very poor" and that it would have been much less hazardous for the vessel to have ordered the Houston pipe offloaded first. The Houston pipe was not discharged before the New Orleans pipe for economic reasons. As Henry Charles Isenberg, Senior Vice President for Cooper/T. Smith Stevedores, testified, it would have cost the time-charterer Pioneer "many thousands of dollars" more to have offloaded the Houston cargo first.

As a result of his being struck by improperly stowed pipe on petitioners' vessel, John Woods suffered a cerebral concussion, an open comminuted fracture of the right hip, facial abrasions, an open fracture of the right kneecap, a fractured left wrist, loss of teeth, and a fracture of the back's transverse processes, among other injuries. He has undergone several surgeries, and additional surgery has been recommended. He continues to receive physical therapy. Mr. Woods has also received psychiatric treatment for major depression as a result of his physical disabilities.

ARGUMENT

THE FIFTH CIRCUIT CORRECTLY HELD THAT A VESSEL-OWNER HAD A DUTY OF ORDINARY CARE TO PROTECT LONGSHOREMEN DISCHARGING CARGO THAT WAS IMPROPERLY AND DANGEROUSLY STOWED AT A PRIOR PORT WHEN THE DANGEROUS CONDITIONS WITH RESPECT TO THE CARGO WERE RECOGNIZED AND CREATED BY THE VESSEL-OWNER.

The applicable standard of care in this §905(b) case is that enunciated by this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). In *Scindia*, the Court held that the duty of a shipowner who turns a vessel over to a stevedore

> *. . . extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property,* and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The *shipowner thus has a duty with respect to* the condition of *the ship's* gear, equipment, tools, and *work space to be used in the stevedoring operations;* and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

451 U.S. at 166-67 (citations omitted) (emphasis added).

The *Scindia* Court also held that

> *. . . absent* contract provision, positive law, or *custom to the contrary . . .* the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous

> conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself.

451 U.S. at 172 (emphasis added).

The *Scindia* Court goes on to state, however, that

> . . . if the shipowner should anticipate that the stevedore will not or cannot correct the danger and that the longshoremen cannot avoid it, then the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard.

Id. at 175.

In such circumstances, if the vessel knows of a danger within the cargo operations and knows that the stevedore is continuing to work in danger, then the vessel is imputed to have the knowledge that "an unreasonable risk of harm" exists for the longshoremen. *Id.* at 175-76. In "such circumstances, [the vessel] ha[s] a duty to intervene." *Id.* at 176. The same is certainly true whenever, as in the case at bar, an unreasonably dangerous condition exists at the outset of the stevedoring operations. In such cases, the vessel "must be deemed to have been aware of [the] condition." *Id.*

In the case at bar, abundant evidence was presented with respect to the extent of the vessel-interests' knowledge of the unreasonable risk of harm posed to the longshoremen because of the improperly stowed cargo of

steel. No question existed but that the vessel and its owners actually knew that the cargo in hold number 2 had been improperly stowed. The vessel's stowage plan did not call for the pipe to be overlapped. The vessel's officers had the "final say so" over the stowage of their ship. Because of this, only the ship's officers could have given an order to have the Houston-bound pipe offloaded before the New Orleans cargo, a decision that would have considerably lessened the unreasonable danger confronted by the longshoremen.

It is also undisputed that the cargo was loaded in Brazil, and respondent, his employer, and his coemployees had absolutely nothing to do with the manner in which the cargo was stowed on the M/V SAMMI HERALD. Thus, the vessel-interests breached their duty to exercise ordinary care under the circumstances to turn over a ship in a reasonably safe condition to the discharging stevedore. The vessel's master, mate, and crewmembers were aware of the overlapped nature of the cargo *prior* to the commencement of the discharge operation. The overlapped condition of the pipe was contrary to the vessel's own cargo plan. Notwithstanding the vessel-interests' actual knowledge of the dangerous condition of the stowage in the case at bar, *Scindia* requires only that the vessel have constructive knowledge of such a condition. *See Scindia*, 451 U.S. at 166-67.

The evidence produced at trial demonstrated that petitioners Sammiline Company, Ltd. and Hightworth Shipping, Ltd., the owner-operator of the M/V SAMMI HERALD, and Pioneer Navigation, Ltd., the vessel's time-charterer, played an active role in the stowage of the cargo of steel pipe in hold number 2 in Brazil. An agent for Pioneer Navigation testified that Borda Livre's practice, as a surveyor of cargo, was not to give instructions to loading

stevedores in Brazil with respect to how the cargo was to be loaded unless the vessel's master asked Borda Livre to do so. The preliminary stowage plan for the cargo was subject to the master's approval. The master of the M/V SAMMI HERALD had the power to change the stowage plan simply because any cargo loaded on his vessel was carried subject to his approval. Stowage remained the master's responsibility. No cargo was loaded aboard the M/V SAMMI HERALD over the objection of the master. In the case at bar, the master approved the stowage plan. In particular, the master and chief mate of the vessel followed the loading operations.

In the case at bar, the chief mate of the M/V SAMMI HERALD testified that he undertook the duty, on behalf of the vessel, to oversee loading of the cargo in Brazil. He would go into the vessel's holds to check the lashing and position of the cargo. He acknowledged that he had authority to and actually did recommend procedures for loading to the cargo interests. And, he acknowledged that the loading stevedores in Brazil did not have the authority to correct the loading of the cargo. Most importantly, he approved the condition of the cargo's stowage before the ship left Brazil, even though he confessed that the stowage was not in the best condition. He admitted that the cargo, as stowed in Brazil, was in this same substandard condition when the M/V SAMMI HERALD arrived in New Orleans. He knew this because he again inspected the holds of the vessel, including the number 2 hold, before the discharge operations commenced. He was also aware of the stowage plan, which called for an alleyway between the cargo and which he reviewed prior to the discharge of the cargo.

The vessel's master testified that it is customary for the chief mate to inspect cargo after it has been loaded onto

the vessel. He also testified that the cargo of steel pipe, albeit destined for two different ports, was overlapped as loaded in Brazil. Yet, he testified that he left for New Orleans even though he believed the cargo might be unsafe for the discharging stevedores. He did this for the simple reason that he believed he was not in a position to put the charterer's economic expectations at risk.

Under *Scindia*, the shipowner is ". . . responsible for eliminating dangerous conditions which exist at the outset of the stevedoring operations." *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 115 (5th Cir. 1981). In *Lemon*, the jury found that the defendant shipowner was negligent in the method and manner of stowing the cargo and that this negligence proximately contributed to the plaintiff's injury. The court found that the chief mate had actual knowledge of an "improper loading technique and failed to take actions to either correct the stowage or warn the plaintiff or his coworkers of the dangerous conditions contained within the stow." *Id.* at 116. This is precisely the situation in the case at bar. Evidence demonstrates that the vessel's officers and crew had actual knowledge of the fact that the cargo in hold number 2 had been improperly loaded and stowed. No evidence exists to the contrary to suggest that they undertook to correct the stowage or to warn the longshoremen of the danger. Evidence furthermore demonstrates that the improper stowage was brought to the attention of the vessel *prior* to the commencement of the discharge operation. As the *Lemon* court made clear, "the ability of a longshoreman to recover cannot turn on who was in the best position to recognize and remedy a dangerous condition when that condition was created by a vessel owner who knew or should have known of its existence prior to the stevedore's operations." 656 F.2d at 116.

In *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128 (5th Cir. 1986), the plaintiff was injured when he slipped from a grease covered ladder. Defendant, like those in the case at bar, contended that it was justified in relying on the ship-repairer's "judgment that the conditions, though perhaps dangerous, were nonetheless safe enough." *Id.* at 131. The trial court found, however, that only a complete degreasing of the work area prior to the repair operations undertaken by plaintiff's employer would have made the workplace safe. In affirming a judgment for the plaintiff, the Fifth Circuit held that it was not reasonable for the vessel to rely on the stevedores' judgment that "conditions were adequately safe." *Id.* at 132. Because only complete degreasing would remedy the dangerous condition, the vessel knew that the dangerous condition could not be neutralized. The *Barrios* ccurt also noted that the cost of the degreasing would be so high that "in the absence of express instructions" from the vessel, the ship-repairer would not undertake the task on its own. *Id.* at 132. Similarly, in the case at bar, the vessel-interests knew that the Houston-bound pipe overlapped the pipe to be discharged at New Orleans. Thus, it was simply not reasonable for the vessel-interests to rely on the stevedore's judgment that the New Orleans pipe could be discharged in advance of the Houston pipe in an adequately safe manner. As a marine surveyor testified, it was impossible to discharge the New Orleans pipe without striking the Houston cargo. The crane operator for the longshoring crew found this to be true as well. In addition, the longshoremen did not have authority to discharge the Houston pipe.

In *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), longshoremen in the port of New Orleans were ordered to unload coffee from the hold of a vessel. Similar to the cargo of steel pipe in the case at bar, the sacks of coffee were not properly secured, nor were they

supported by dunnage. Like the steel in the case at bar, "the sacks appeared to have been jammed or thrown into the hold." *Id.* at 298. Four longshoremen testified that they believed the stowage was dangerous. One of the longshoremen complained to the ship's mate about the stowage, but the mate only nodded his head. *Id.* This is exactly what the stevedore's supervisor experienced in the case at bar when he informed the ship's mate about the poor stowage of the cargo. One of the longshoremen in *Harris* also complained to his superintendent, as did one of the longshoremen in the case at bar. Similar to the longshoremen in the case at bar, the longshoremen in *Harris* testified that there was nothing they could do about the dangerous condition of the stow but to try to unload it. *Id.* at 298.

The trial court in *Harris* found, as petitioners in the case at bar would have this Court hold, that because the improperly stowed cargo created an obvious danger and because the longshoremen knew of this danger, the ship was relieved of any liability under 33 U.S.C. §905(b). The Fifth Circuit, however, reviewed the Court's decision in *Scindia* as well as its own precedent in *Lemon*, and it held that a shipowner can "be liable for negligently stowed cargo which caused injury." *Id.* at 299. As in *Lemon*, the negligence which had caused the plaintiff's injury in the *Harris* case "occurred in the method and manner of stowing cargo that was delivered to the longshoremen and stevedore." *Id.* at 299. Because the chief mate of the ship had knowledge of the prior improper loading techniques and had failed to correct the improper stow or to warn the longshoremen of the danger, the *Harris* court held that the shipowner must be "responsible for eliminating dangerous conditions which exist at the outset of the stevedoring operations." *Id.* at 299 (*quoting Lemon*, 656 F.2d at 115).

In *Harris*, evidence existed that the danger was obvious and that the shipowner contributed to it by not having dunnage. Evidence existed as well that the vessel-interests had knowledge prior to plaintiff's injury that the cargo was improperly stowed and that "the longshoremen were continuing to unload the cargo despite the inherent danger." *Id.* at 299. The fact that the danger was "obvious" was not deemed a complete defense to the longshoreman's suit "because when faced with an openly dangerous shipboard condition, the longshoremen's 'only alternatives would be to leave his [sic] job or face trouble for delaying the work.'" *Id.* at 299 (*quoting Stass v. American Commercial Lines, Inc.*, 720 F. 2d 879, 882 (5th Cir. 1983), *quoting Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 509 (2d Cir. 1976)). *Accord Scindia Steamship Navigation Co. v. De Los Santos*, 451 U.S. 156, 176 n.22 (1981). The *Harris* court specifically found that "'a longshoremen's [sic] own knowledge of a shipboard hazard will not negate a shipowner's duty of care which would otherwise exist.'" *Id.* at 300 (*quoting Stass v. American Commercial Lines, Inc.*, 720 F.2d at 882, *quoting* Note, 56 **Tul. L. Rev.** 1421, 1432 (1982)); *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 897 (5th Cir. 1989).

In the case at bar, as in *Lemon*, *Barrios*, and *Harris*, a stevedoring crew was confronted with the task of discharging cargo that was improperly stowed in a vessel at a prior port of call. The stevedores did not in any way contribute to the improper stowage. The vessel-interests, through the vessel's own officers, various marine surveyors, and other individuals, were made fully aware of the problems and dangers posed by the improperly stowed steel. Yet, the vessel-interests failed to act. They failed to direct that the Houston cargo be offloaded first, either in New Orleans (where it could later be reloaded onto the vessel) or in Houston. Although members of the ship's crew

observed the offloading operation during its slow and difficult course, the vessel-interests failed to intervene in order to authorize a safer means of discharge. Finally, the longshoremen themselves continued to work for the simple reason that they knew they would not otherwise be paid. Whether knowledge of an unreasonably dangerous condition that existed from the outset of a stevedoring operation is chargeable to the vessel-owner is a "triable issue." *Scindia*, 451 U.S. at 179. In the case at bar, the jury properly found that the vessel-interests were well-aware of the hazards posed by the dangerous stowage of cargo and did nothing either to warn or to protect the respondent.

In their petition for a writ of certiorari, petitioners challenge the well-established standard of care in a §905(b) case. In *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983), the Fifth Circuit interpreted *Scindia* to mean that "Once loading operations have begun, the vessel owner can be held liable for injuries to employees of the stevedore resulting from open and obvious dangers only in the event of actual knowledge of the danger and actual knowledge that he cannot rely on the stevedore to remedy the situation." *Id.* at 1038-39. In footnote 12, the *Helaire* court opines that "[t]he opinion in *Scindia* recognized that the owner's actual knowledge of a dangerous condition which later injured a longshoreman would not in itself make him negligent. It might well be 'reasonable' for the owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough." *Id.* at 1039, n.12. In *Helaire*, however, the court specifically confronted a situation in which a loading operation had already commenced. In the case at bar, the stowage of steel pipe in Brazil created an unsafe condition aboard the vessel that preexisted the New Orleans longshoremen's discharge operation. Thus, the case at bar is more factually akin to *Barrios*, *Lemon*, and *Harris* than to *Helaire*. The improper stowage was not only

a condition of which the vessel-owner had actual knowledge, but the vessel-interests had actual knowledge as well that they could not rely on the longshoremen to remedy the hazardous stowage simply because the stevedores did not have the authority first to offload the Houston pipe (before discharging the New Orleans cargo) or to order that the M/V SAMMI HERALD first call at Houston.

The *Helaire* court's suggestion that "it might" be reasonable for the owner to rely on "the stevedore's judgment that the condition, though dangerous, was safe enough," does not translate into a hard and fast rule, which suggests that a vessel-owner is in all cases entitled to rely absolutely on a stevedore's judgment. If this were the case, a vessel-owner, despite actual knowledge of a dangerous condition in the stowage, would never be legally responsible for hazardous conditions preexisting a longshoreman's appearance aboard a ship because it could always swear that it relied upon the stevedore's judgment. *Scindia* holds just the opposite in stating that a vessel-owner cannot rely upon a stevedore to correct a dangerous situation if it has actual knowledge that the stevedore cannot remedy the situation. *See Scindia*, 451 U.S. at 175. As the Fifth Circuit held in *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1247 (5th Cir. 1982), the mere fact that a dangerous condition is open and obvious to the stevedore does not bar a longshoreman's recovery under §905(b). Similarly, in the case at bar, the fact that the stevedores actually undertook to discharge cargo is not proof that they believed it was safe to do so. In fact, the evidence suggests that the manner in which the cargo was stowed aboard the M/V SAMMI HERALD was so unusual that the stevedores were informed prior to discharging the steel that they would need to work very slowly because of the hazardous conditions.

In their petition in support of a writ of certiorari in the case at bar, petitioners contend that review is warranted by the Court on the basis that the Fifth Circuit's jurisprudence is in direct conflict with the holding of the Third Circuit in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1733 (1988). In *Derr*, the Third Circuit held that the shipowner had "no duty to supervise or [to] inspect cargo loaded or unloaded by stevedores and therefore [could] not be held liable for injuries arising out of the stevedore's failure to perform his job properly." *Id.* at 493. This reasoning must be analyzed in light of the facts in *Derr*. As the Third Circuit noted, the real issue before it was "not where the cargo was loaded, but whether a vessel may be held negligent for *failure* to inspect or supervise the stowage of cargo." *Id.* at 495 (emphasis added). The *Derr* court found that the vessel's duties under §905(b) were not increased merely because cargo had been loaded by a foreign stevedore. In *Derr*, the injured longshoreman had contended that the vessel was negligent for its failure to inspect or supervise the stowage of cargo. In the case at bar, however, evidence suggests that the vessel-interests did indeed inspect and supervise the stowage of cargo in Brazil, thereby undertaking an affirmative duty with respect to the cargo's stowage. The *Derr* court specifically left "open the issue of a duty by the ship" when evidence suggests "that the cargo presented an exceptional situation." *Id.* at 496 n.3. As the *Derr* court further noted, the district court in that case "did not reach the issue of the vessel's actual knowledge of improper stowage." *Id.* In the case at bar, the district court and the jury did reach this issue, for abundant evidence was presented that the vessel had actual knowledge of the improper stowage. In the case at bar, the vessel-interests assumed a duty with respect to a plan for the stowage of cargo, and they breached the standard they themselves had set concerning this plan. Furthermore, in

the case at bar, unlike *Derr*, the vessel-owner changed the port of entry from Houston to New Orleans, thereby increasing the hazard to offloading longshoremen. *Derr* is thus factually inapposite both to the case at bar and to the long line of Fifth Circuit jurisprudence, with which petitioners allege *Derr* is in conflict. Accordingly, certiorari is not warranted in this case to resolve what petitioners perceive as a split of authority within the circuits with respect to the cause of action governed by 33 U.S.C. §905(b).

CONCLUSION

For the foregoing reasons, respondents submit that the Court should deny petitioners' writ of certiorari.

Respectfully submitted,

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